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IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. ~~508~~ 183

UNION PACIFIC RAILROAD COMPANY,
Petitioner,

against

JAMES J. E. BURKE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ARTHUR W. CLEMENT,
WILSON E. TIPPLE,
Attorneys for Respondent.

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May it please the Court:

This action was brought to recover the value of a certain shipment lost while in the hands of the defendant as a carrier. The liability of the defendant is conceded, the only question in dispute being the amount of that liability.

THE FACTS.

On March 10, 1915, at Yokohama, Japan, the firm of S. Ontra & Brother, delivered to the Pacific Mail Steamship Company, a shipment consisting of 56 cases of drawn work and renaissance of the invoice value of $17,549.01, consigned to

New York to be carried from Yokohama to San Francisco by the Pacific Mail Steamship Company and by rail from San Francisco to New York by the Southern Pacific Company and its connecting carriers including the defendant.

The Steamship Company issued at Yokohama a bill of lading which in terms purported to fix the value of the shipment at $100 per package.

The Pacific Mail Steamship Company transported the property to San Francisco, and at that place delivered the property to the Southern Pacific Company, the initial rail carrier.

The Southern Pacific Company in turn transported the property to the end of its line and there delivered the property to the defendant, the Union Pacific Railroad Company, the next connecting carrier.

The property was totally destroyed at Rawlins, Wyoming, while still in the possession of the defendant as a carrier.

THE TARIFFS.

The shipment so far as its transportation from San Francisco to New York is concerned, was interstate commerce and concededly moved under a rate of $1.25 per hundred pounds based upon a minimum carload weight of 30,000 pounds.

This rate was duly filed and established by the defendant (Item 250 of Transcontinental Freight Bureau East Bound Import Tariff No. 26A Exhibit B, Record, page 20), and was governed by Western Classification No. 53.

Rule 9 of Western Classification No. 53 is printed at length at Record, page 13. In brief, it provides that at the established rate, the shipment

shall be carried subject to the terms of the uniform bill of lading.

The uniform bill of lading upon the use of which the rate given was conditioned appears in the Record at pages 14 and 15. It contains no limitation on the amount of plaintiff's recovery, except the second paragraph of the third section which merely limits the shipper's recovery in the invoice price of the shipment and reads as follows:

> "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona-fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence."

The material parts of all the tariffs filed by the defendant are stipulated (fol. 12) and in none of defendant's tariffs is there any provision limiting the amount of defendant's liability or any provision for alternative rates based upon a valuation placed upon a shipment.

From the above it is clear:

1. That this shipment moved at the time of its loss under a rate, tariff and classification duly filed by the defendant as required by the Interstate Commerce Act.

2. That the rate under which this shipment moved from San Francisco to New York was conditioned upon the use of the uniform bill of lading and of no other bill of lading.

3. Only one rate was filed and offered by the defendant i. e., $1.25 per hundred pounds. Whether the shipper at San Francisco had said "my shipment is valued at $500 per package" or "my shipment is valued at $10 per package," defendant's charge could only have been $1.25 per hundred. *It was the only legal rate.*

THE CONTROVERSY.

The only question was as to the amount of the defendant's liability.

The defendant contended that its liability is limited to $100 per case, the amount specified in the bill of lading issued at Yokohama, Japan, by the Pacific Mail Steamship Company (Exhibit A, Record, pages 7 and 8) claiming that this $100 limitation was incorporated by reference into the uniform bill of lading, as an "agreed valuation."

The plaintiff contended:

1. That the $100 clause of the Japanese bill of lading is void in so far as this loss in interstate commerce was concerned, because it was not filed as a part of defendant's interstate tariff.

2. That even if the $100 clause of the Japanese bill of lading be held to be incorporated by reference into the uniform bill of lading, nevertheless it is void and illegal because it is not an agreed valuation based on a difference in freight charges and it is therefore void under the decisions of the Federal courts which control this case.

The action was submitted to the Appellate Division of the New York Supreme Court upon an agreed statement of facts. The Appellate Division, misapprehending the holding of this Court in Reid vs. Fargo, 241 U. S., 544 (fol. 77) held that the shipper's recovery was limited to $100 but allowed an appeal to be taken to the New York Court of Appeals.

The New York Court of Appeals correctly interpreting Reid vs. Fargo (fol. 141), reversed the decision of the Appellate Division, and awarded the plaintiff judgment for the full amount of his claim on the distinct ground that the $100 limitation would in any case be void as it was not based upon a difference in freight rates.

The defendant carrier now seeks to review this decision by a writ of certiorari basing its application on the following principal grounds:

1. The petitioner claims that the questions of law herein have not been passed upon by this Court, and

2. That the Court of Appeals has by its decision failed to follow the decision of this Court in Reid vs. Fargo, 241 U. S., 544.

I.

The decision of the New York Court of Appeals was in accord with a principle long established by the decisions of this court.

The Court of Appeals correctly held that this shipment was at the time of its loss, interstate

commerce, moving under a filed rate and tariff and subject to the terms of the uniform bill of lading, and recognized the binding force of the decisions of this Court.

The Court of Appeals in its opinion cited many decisions of this Court and drew the correct conclusion that under the authorities an "agreed or released valuation is valid and effective as the extent of a loss, only when it is related to the rate charged for transportation" (fol. 132).

Applying this principle to the present case, the Court of Appeals held invalid the petitioner's claim that plaintiff's recovery was limited to $100 per package upon the ground that such a limitation would be void because the one rate offered by the carrier had no relation to the "agreed valuation" and there were no alternative rates and values offered to the shipper (fols. 139-140).

The proposition of law enforced by the Court of Appeals in this case has been repeatedly passed upon by this Court.

It is a fixed requirement of all the decisions of this Court sustaining agreed valuations that an "agreed valuation" to be valid must be supported by a freight rate based upon it, or in other words the shipper must have obtained a lower freight rate in consideration of agreeing to the limited valuation of his shipment.

Thus in the leading case of Hart vs. Penn. R. R. Co., 112 U. S., 331 the Court said:

> "The distinct ground of our decision in the case at bar is that where a contract of the kind signed by the shipper is fairly made agreeing on the valuation of the property carried, *with the rate of freight based on the*

> *condition that the carrier assumes liability only to the extent of the agreed valuation,* even in the case of loss or damage by the negligence of the carrier the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives and of protecting himself against extravagant and fanciful valuation" (our italics).

In Adams Express Co. vs. Croninger, 226 U. S., 491, its first valuation decision under the Carmack Amendment, this Court said:

> "It has therefore become an established rule of the common law as declared by this court in many cases that such a carrier may by a fair, open, just and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage, *to an agreed value made for the purpose of obtaining the lower of two or more rates or charges proportioned to the amount of the risk*" (our italics).

In the more recent case of Boston & Maine R. R. vs. Piper, 246 U. S., 439, this Court by Mr. Justice Day summed upon its holdings in the various cases as follows:

> "The Carmack Amendment requires the initial carrier to issue a bill of lading, and carriers are obliged to carry the articles shipped at the rates fixed in the published tariffs. Many decisions of this Court have held that the carrier may offer to the shipper

and the shipper may be bound by a contract which limits recovery to a valuation declared by the shipper in consideration of the reduced rate for the carriage of the freight. This rule was stated in an early case arising after the passage of the Carmack Amendment (Adams Express Co. vs. Croninger, 226 U. S., 491, 509, 510) and has been frequently reiterated since.

"In the cases in which the recovery for the lesser valuation has been affirmed, the shipper was offered an opportunity to recover a greater sum than the declared value upon paying a higher rate to the carrier. The shipper was offered alternative recoveries based upon different valuations upon the payment of different rates, and was held bound by the one chosen." (Our italics.)

See also The Kensington, 183 U. S., 263.

From the foregoing, it is obvious that the Court of Appeals in the present case merely correctly applied a proposition of law repeatedly passed upon by this Court.

II.

The Court of Appeals correctly interpreted and followed the decision of this court in Reid vs. Fargo, 241 U. S. 544:

Petitioner's counsel rests his entire case upon the case of Reid vs. Fargo, 241 U. S., 544, claiming, as he stated in the courts below that it is "an express adjudication that, by the law as administered in the Federal courts, an agreed valuation

is valid and binding regardless of whether or not the freight rate is based upon the valuation agreed upon."

The record in that case shows that that case is not authority for any such proposition.

The bill of lading in that case (which was not as in the present case, invalidated by the Interstate Commerce Act) provided that the freight was adjusted to the value declared, and also provided an opportunity for the shipper to declare a higher value on the payment of a higher rate. *No proof in contradiction of this statement contained in that bill of lading was offered on the trial of that action* (See Court of Appeals opinion in present case, fol. 143), so that in approving the limited recovery in Reid vs. Fargo, this Court merely followed its holding in Cincinnati, New Orleans and Texas Pacific Ry. vs. Rankin, 241 U. S., 319, i. e., that the uncontradicted statement of the bill of lading was sufficient to sustain the agreed valuation, being prima facie proof that lawful alternate rates based on specific values had been offered to the shipper and that the shipper had made his choice.

It will thus be seen that there is nothing in Reid vs. Fargo which in any conflicts with the other decisions of this Court, to the effect that an agreed value to be valid must be supported by a freight rate based upon it, and the opinion of the New York Court of Appeals (fols. 141-143), shows that that decision of this Court was correctly interpreted and applied in the present case.

It might be well to add that the shipment in Reid vs. Fargo was an ocean shipment moving from London to New York and entirely outside of

the scope of the Interstate Commerce Act. Consequently no question of the binding force of the provisions of filed tariffs and rates was there involved. In the case of an ocean shipment, the carrier is entirely free, except as restrained by business reasons, to change the terms of carriage and the amount of its charge with each shipper and with each shipment.

III.

From the foregoing, it is obvious that this case involves no novel question but merely an application to an everyday state of facts of a principal of law well settled by the decisions of this Court. A reading of the opinion of the Court of Appeals will show conclusively that that Court correctly construed, followed and applied the decisions of this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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